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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
Implementation of the Telecommunications Act of 1996	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information	)	CC Docket No. 96-115

PETITION OF BELL ATLANTIC FOR PARTIAL RECONSIDERATION AND FORBEARANCE

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PETITION OF BELL ATLANTIC[1]
FOR PARTIAL RECONSIDERATION AND FORBEARANCE

I. Introduction and Summary

Bell Atlantic respectfully requests that the Commission modify, through reconsideration or forbearance, certain of its rules implementing section 222 of the 1996 Act regarding the use of customer proprietary network information, or "CPNI."[2]

First, the Commission should modify its rules governing the use of CPNI to provide customer premises equipment, or "CPE," and information services. It should do so in the first instance by reconsidering its rules to permit CPNI relating to a telecommunications service to be used to provide CPE that is "necessary to, or used in" the provision of that service – for example, to provide display units that are needed to use Caller ID service or to provide

[1] Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; New England Telephone and Telegraph Company; and Bell Atlantic Mobile, Inc.

[2] *See Second Report and Order and Further Notice of Proposed Rulemaking*, 11 Comm. Reg. (P&F) 69-2145 (1998) ("Order").

specialized premises equipment necessary to use many high speed data services such as ISDN or digital subscriber line services. Likewise, the Commission should reconsider its rules to permit CPNI from telecommunications services to be used to provide information services that are necessary for certain services to function, such as protocol conversions, or that are used by a customer to complete his or her communications, such as message storage and retrieval and Internet access services.

More generally, Section 10(a) of the 1996 Act provides that the Commission "shall forbear" from applying its rules or the requirements of the Act where, as here, the test specified in that section is satisfied. The Commission previously has concluded that each element of that test is satisfied for carriers' use of CPNI from telecommunications services to sell, market, and provide all CPE and information services without prior consent. Consequently, the Commission "shall forbear" from applying its rules that restrict the use of CPNI in these circumstances.

Second, the Commission should modify its rule barring the use of CPNI to "win back" customers who have recently changed carriers. By limiting a carrier's ability to compete vigorously for these customers, the Commission's rules will affirmatively harm, rather than promote, competition, and they will deny customers the full benefit of having competing carriers simultaneously vying for their business. As a result, the Commission should reconsider its rules to permit carriers to use CPNI to try to win back a departing customer, or, alternatively, forbear from enforcing the statutory provision that it found bars such use.

Third, while the relief outlined above should be granted to wireline and wireless carriers alike, the Commission also should modify its rules for wireless carriers in additional respects. Specifically, the Commission should reconsider its rules defining the wireless basket of

services within which CPNI may be used without prior permission to include all services, products or equipment used in connection with the carrier's wireless services, or forbear to the same effect. This broader relief is especially appropriate in the context of the wireless industry, where carriers have long provided, and customers expect, integrated service packages, and where the level of competition, and resulting customer "churn," from a variety of carriers offering these types of integrated packages, is intense. It not only would be highly disruptive to require prior authorization to use CPNI in the manner that the wireless industry has always used it, but the end result would be to deprive consumers of the benefits they currently receive by way of increased convenience and enhanced competition. In short, the status quo benefits consumers, is pro-competitive, and should be retained.

Finally, the Commission should not micro-manage the details of each carrier's information systems. Instead, it should establish basic requirements, and leave it to the carriers how to adjust their systems to meet those requirements.

II. The Act Does Not Require Prior Consent To Use CPNI From a Telecommunications Service To Provide Related CPE or Information Services.

The Commission bases its requirement to obtain prior consent in order to use CPNI to provide CPE or information services, codified at 47 C.F.R. § 64.2005(b)(1), on an unnecessarily narrow reading of the Act. On reconsideration, the Commission should interpret Section 222(c)(1) to allow carriers to use CPNI without prior consent to market and sell both CPE and information services that are functionally related to the telecommunications service from which the CPNI is derived.

a. *CPE*

The Act allows CPNI from a telecommunications service to be used only to provide the service from which the information is derived and "services necessary to, or used in, the provision of such telecommunications service" 47 U.S.C. § 222(c)(1). Because it found that CPE is "equipment," not a "service," the Commission held that use of telecommunications service CPNI to market or sell CPE is barred. Order at ¶ 71. The Commission based this finding not on any statutory language, nor any legislative history that defines "service," but simply on its determination that CPE "historically has been categorized and referred to as equipment." *Id.*

However, the Commission has frequently defined provision of equipment on a customer's premises, including CPE, as part of the related service. For example, in the CPNI Order itself, it properly found that inside wiring installation, maintenance, and repair is necessary to, and used in, the provision of the telecommunications service with which it is associated and allowed CPNI from any telecommunications service to be used to market or sell inside wiring. Order at ¶¶ 78-80. The Commission has defined inside wiring to include "such items as routers, hubs, network file servers, and wireless LANs," all of which are CPE. *Federal-State Board on Universal Service*, 12 FCC Rcd 8776, ¶ 460 (1997) (footnote deleted). Therefore, the Commission has already permitted CPNI from a telecommunications service to be used to provide these items of CPE when they are provided with inside wiring.

In addition, the Commission has long held that there are certain items of equipment that a carrier may provide on a customer's premises as a necessary part of a telecommunications service, such as multiplexers, channel banks, and loopback testing devices. *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations (Second*

Computer Inquiry), 77 F.C.C. 2d 384, n.57 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Memorandum Opinion and Order on Reconsideration*, 3 FCC Rcd 1150, ¶ 138 (1988) ("Phase II Reconsideration Order"). Each of these items of equipment would be CPE if provided separately from the service, but they are part of the common carrier offering when they are "used in" the telecommunications service, and therefore may be provided using the telecommunications service CPNI. There is no statutory or policy reason to distinguish for Section 222 purposes either CPE that is part of inside wiring, or premises equipment that is part of a telecommunications service, from CPE that is "used in" an underlying telecommunications service. Therefore, the Commission has not always made a distinction between "services" and "equipment," and there is no reason to do so here.

Furthermore, the Commission even said that it might examine in the future whether the public interest would be better served by allowing carriers to market CPE within the total service approach. Order at ¶ 77. If the CPNI limitation were based entirely on a statutory interpretation, as the Order states, it could not be changed based on a public interest finding.[3] Therefore, the Commission has already recognized that Section 64.2005(b)(1) of the Rules, as it relates to CPE, is not based on an immutable statutory interpretation.

Accordingly, the Commission should reconsider paragraph 71 of the Order and Section 64.2005(b)(1) of its Rules to allow a carrier to use CPNI from a telecommunications

[3] The public interest is one prong of a Section 10 forbearance finding, 47 U.S.C. § 160(a)(3), but the Commission's reference to the public interest here is not in the context of forbearance.

service to market or sell CPE that is "necessary to, or used in, the provision of such telecommunications service."[4] Several types of CPE fall into that category.

First, as CTIA and GTE have already demonstrated, wireless equipment, such as handsets, antennas, adaptors, batteries, wireless data terminals, pagers and other wireless devices, are integral to wireless telecommunications services. CTIA, Request for Deferral and Clarification at 16-22 (filed Apr. 24, 1998); GTE, Petition for Temporary Forbearance or, in the Alternative, Motion for Stay at 9-10 (filed Apr. 29, 1998). The wireless services marketplace is characterized by a variety of incompatible analog and digital technologies, and the equipment that a customer uses must be compatible with the technology that its wireless service provider has installed. Without compatible customer equipment, there would be no service. For this and other reasons, the Commission allowed the bundling of wireless services with associated equipment. *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028 (1992) ("Cellular Bundling Order").

Second, certain wireline services require specialized CPE, without which the service will not operate properly. One such example is Digital Subscriber Line ("DSL") service. A specialized modem, which may provide connectivity to the Internet, is an inherent part of DSL service and must be compatible with the matching DSL modem the carrier has deployed in the central office. Similarly, Integrated Services Digital Network ("ISDN") service cannot use standard analog telephone sets. Instead, the customer must obtain specialized ISDN sets. Specialized CPE is also necessary for the successful use of such advanced services as ATM, SONET, SMDS, and Frame Relay.

[4] Bell Atlantic shows in Section III below that the Commission should also forbear from applying the Section 222 provisions and its associated rules to all CPE.

Specialized CPE is likewise needed for some vertical features of telephone service. For example, customers need a Caller ID display unit or screen phone to use the features of various services that use Caller ID technology that display the number or associated listed name of an incoming call, and of earlier calls that were not answered. Similarly, specialized CPE is needed to provide a visual call waiting indicator, a basic service element used with voice messaging, and services which provide a distinctive ring depending on the person being called. The hearing- and sight-impaired require specialized CPE, such as TTY and voice amplification products. In all these cases, the CPE is "necessary to, or used in," provision of the telecommunications service, and the carrier should be allowed to use the CPNI from that service to market and sell the related CPE without prior customer consent.

b. *Information Services*

The Commission also found that CPNI from telecommunications services may not be used to market or sell information services without consent. Order at ¶ 72, 47 C.F.R. § 64.2005(b)(1). It found that, while the information services it considered[5] use telecommunications services, they are not "necessary to, or used in" provision of the telecommunications service. Order at ¶ 72. The Commission should reconsider that finding.

The information services that the Commission considered all have the primary purpose of allowing the intended recipient to receive the sender's message on a delayed basis. Call answering, voice mail or messaging, and voice storage and retrieval services, in connection with both wireless and wireline services, either answer a call upon a busy or no answer and

[5] Call answering, voice mail or messaging, voice storage and retrieval, fax storage and retrieval, and Internet access services.

record the caller's message for later delivery to or retrieval by the intended recipient, or record a message in a mailbox that one or more intended recipients may retrieve.[6] Fax store and forward stores a facsimile message until the recipient's fax machine is available, at which time the message is delivered. In each case, the only way that the call can be "completed" and the sender's information received by the intended recipient is for the message to be stored, and that makes each of the services an information service. 47 U.S.C. § 153(20) (which defines an information service as including the capability for storing, retrieving, and making available information). If that storage did not occur, there would be no communication, because the intended recipient would have no way of receiving the message. Therefore, the information service capability is "used in," the completion of the end-to-end communication.

Similarly, Internet access provides browser functions, key word searches, and other information service functions that allow a customer to reach the intended destination – an Internet Website database somewhere in the world. It is rare that the customer knows the Internet address of a distant database, or even which of the millions of available Websites is likely to contain the desired information. Without the information service functions, the Internet would be of limited utility.[7] This information service, therefore, is "used in" the communication and allows it to be successfully completed with the Internet database.

Another category of services, not discussed in the Order or the CPNI rules, which the Commission has defined as an information service, is protocol conversion. *Implementation*

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[6] The latter may involve recording a message, such as a meeting announcement or postponement, for authorized members of an organization.

[7] A customer who knows the Internet address of the Website could simply type in that address and be routed to the database. This is analogous to dialing a telephone number and does not involve an information service.

of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended, 11 FCC Rcd 21905, ¶ 104 (1996). A protocol conversion generally allows two incompatible telecommunications networks or terminals to exchange information. Without the protocol conversion, communication would not be possible, because the networks or equipment would be unable to understand the message and would reject it. Protocol conversions that do not alter the underlying information sent and received should not be defined as information services. Unless the Commission redefines protocol conversions as telecommunications, however, it should find that protocol conversions are needed in order to complete a communication and, therefore, are both "necessary to" and "used in," the telecommunications service or services with which the conversion is associated.

Accordingly, the Commission should reconsider paragraph 72 of the Order and Section 64.2005(b)(1) of its Rules and find that each of these information services meets the requirements of Section 222(c)(1)(B), so that CPNI of the underlying telecommunications service or services may be used to market or sell the related information service without the prior consent of the customer.

III. The Commission Should Forbear From Applying the Section 222 CPNI Restrictions to CPE and Information Services.

Whether or nor the Commission grants reconsideration, it should exercise its forbearance authority under Section 10 of the Act and allow carriers to use the CPNI from telecommunications services to market or sell CPE and information services. Based upon findings that the Commission has already made in Computer Inquiries II and III, findings it should reaffirm here, the three prongs of the forbearance requirements of the Act are easily met. Under those requirements, the Commission "shall forbear" from applying its regulations or any

statutory provision if it determines that (1) enforcement is not needed to ensure that rates are reasonable and nondiscriminatory, (2) enforcement is not needed to protect consumers, and (3) forbearance is consistent with the public interest. 47 U.S.C. § 160(a)(1)-(3).

a. *CPE*

§10(a)(1): Use of the CPNI from a telecommunications service to market or sell CPE cannot affect the reasonableness of the carrier's charges or practices for the underlying telecommunications service. Either those services are regulated at the federal or state level, in which case the regulators will ensure that they are provided on a just and reasonable basis, or they are competitive and deregulated, such as wireless services, in which case the competitive marketplace will prevent unreasonable rates or practices. Additionally, for landline services, the Commission's nonstructural safeguards on the Bell companies' integrated provision of CPE will prevent discrimination.[8] In particular, the Commission requires that underlying telecommunications services be made available under the same rates, terms, and conditions, whether or not a customer chooses to obtain CPE from the Bell company, and requires comparable installation and maintenance intervals for those services. *Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, Report and Order*, 2 FCC Rcd 143, ¶¶ 83-84 (1987) ("CPE Order"); *Memorandum Opinion and Order on Reconsideration*, 3 FCC Rcd 22, ¶¶ 29-31 (1987) ("CPE Reconsideration Order"). During more than a decade of operation of Bell company wireline services under these nonstructural arrangements, the CPE market has burgeoned and today remains highly competitive and robust, as discussed below. Underlying telecommunications

[8] The Commission has not applied nonstructural safeguards to wireless services.

services remain available at just and reasonable rates and nondiscriminatory terms and conditions. As a result, this prong of the forbearance test is met.

§ 10(a)(2): Second, limiting the use of CPNI in the provision of CPE is not necessary to protect consumers. On the contrary, consumers have benefited from the ability of the Bell companies to use CPNI to engage in the integrated provision of CPE and both wireless and landline telecommunications services. Likewise, when the Commission granted the Bell companies CPE structural relief in connection with their wireline services, it found that restricting access to CPNI "would undermine the BOCs' ability to engage in the effective joint marketing of network services and CPE, a significant benefit for the BOCs and their customers." CPE Reconsideration Order at ¶ 20. Accordingly, rather than restricting access to CPNI or requiring prior consent, the Commission adopted an opt-out approach to give consumers the ability to restrict Bell company access to CPNI if they so chose. In addition, wireless services have never been subject to Commission restrictions on use of CPNI to provide CPE.

More than a decade of experience under that approach has shown that both consumers and competition have benefited, and that both will benefit from continuing to allow use of CPNI to provide CPE without consent. Consumers today may choose from a vast array of suppliers of all types of CPE and of intense, wide-open competition. As the Commerce Department recently found, "[t]he customer premises equipment industry is composed of a wide variety of product sectors. Most are mature markets characterized by intense competition and declining unit prices." United States Department of Commerce, DRI/McGraw-Hill, and Standard and Poor's, *U.S. Industry & Trade Outlook '98* at 31-8 (1998) ("1998 Outlook"). It predicts the value of total domestic CPE shipments at $8.2 billion in 1998 and $10 billion by 2002. *Id.* The Commission found over a decade ago that "the CPE marketplace has evolved to a point that most

purchasers are taking advantage of the robust competition that exists and no longer regard 'the telephone company' as the only, or even the principal, source of CPE." CPE Order at ¶ 68. The growth and diversity of the marketplace today certainly confirms that finding and supports a further finding today that consumers will continue to benefit from forbearance. By allowing carriers to use telecommunications CPNI to market and sell CPE without prior consent, the Commission can continue to give consumers the additional competitive option of one-stop shopping in obtaining telecommunications services and CPE. Therefore, the second prong of the forbearance requirement is met.

§ 10(a)(3): Finally, the Commission found as long ago as 1987 that an opt-out approach for the Bell companies' wireline services is in the public interest. *See* CPE Order at ¶¶ 66-70, CPE Reconsideration Order at ¶ 21. In the ensuing period, the CPE marketplace has prospered, and there is no justification for the Commission changing that finding today. This meets the third prong of Section 10(a).

Under the Act, the Commission "shall forbear" from applying statutory or regulatory restrictions when, as here, the three parts of the Section 10(a) test are met. Therefore, the Commission should promptly eliminate the requirement that carriers obtain prior consent to use telecommunications service CPNI to market or sell CPE.

b. *Information Services*

The Bell companies have likewise been allowed to use CPNI to provide wireline telecommunications and information services on an integrated basis since 1988.[9] There has never been a restriction on use of wireless service CPNI to provide wireless information services, and, as discussed in Section V, there is no reason whatever to add such a restriction now. Under the Act the Commission "shall forbear" from requiring customers to give prior consent before CPNI derived from telecommunications services may be used to market and sell information services, because the three parts of the test are met.

§ 10(a)(1): First, limiting the use of CPNI is not necessary to ensure that rates for any telecommunications service remain just and reasonable and not unreasonably discriminatory. On the contrary, the use of CPNI has nothing to do with rates. In any event, the existing nonstructural requirements regulating unseparated provision of information services are equally as strong as those for CPE. The landline Bell companies must obtain all underlying telecommunications services that they use to provide their information services at the same unbundled tariffed rates that are available to competitors. *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C. 2d 958, ¶ 159 (1986). Additionally, the Bell companies are subject to similar nondiscrimination requirements with respect to the installation and maintenance of wireline telecommunications services in

[9] *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order*, 2 FCC Rcd 3072, ¶ 155 (1987) ("Phase II Order"); *Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Rcd 7571, ¶¶ 86-89 (1991) ("Remand Order") (adding the prior consent requirement for customers with more than twenty lines). The Commission is again examining the manner in which it should regulate Bell company provision of wireline intraLATA information services. *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 FCC Rcd 6040 (1998).

connection with information services as they are for CPE. *Id.* at ¶ 161. As shown above for CPE, these requirements fully meet the first prong of the forbearance test.

§ 10(a)(2): Similarly, limiting the use of CPNI is not necessary to protect consumers. On the contrary, consumers benefit, and have benefited for more than a decade, from Bell company integrated provision of telecommunications and information services without the need for prior consent to use CPNI. Likewise, consumers have enjoyed an information service marketplace that is characterized by a wide diversity of suppliers, rapid growth, and falling prices. Bell Atlantic's comments in the pending Computer Inquiry III rulemaking document the robust growth and competitiveness of this market, including the segments in which the Bell companies have entered, the rapid growth of subscribership, and the steep decline in the prices of the information services.[10] As the Commerce Department found in 1994, information services were "among the fastest growing sectors of the economy."[11] Today, the United States is "the world's largest producer and consumer of information technology products and services."[12] Eight out of the top ten information services companies in the world are United States companies, and none is a Bell company.[13]

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[10] Comments of Bell Atlantic in CC Docket Nos. 95-20 and 98-10 at 4-7 (filed Mar. 27, 1998). For example, from 1990-1995, subscribership to landline Bell company voice messaging services grew from 60,000 to 5 million, while prices declined from $30 to $8 per month. Still, no Bell company has garnered more than 3% of the overall voice messaging market, which includes both network-based services and CPE. *Id.* at 6-7.

[11] United States Department of Commerce, *U.S. Industrial Outlook 1994* at 25-1.

[12] 1998 Outlook at 26-1.

[13] *Id.* at 26-1 to 26-2.

Moreover, and as Bell Atlantic also previously demonstrated, consumers and small businesspersons do not understand the CPNI rules and become angered and confused when they cannot easily obtain information about both types of services in the same contact. Comments of Bell Atlantic in CC Docket No. 95-20 at 25-29 (filed Apr. 7, 1995). As shown there, in a focus group with more than sixty participants, only one, an attorney, understood the reasons for the CPNI rules. Most others characterized the existing CPNI notification process as "confusing," "unnecessary," or "ridiculous." *Id.* at 26-27.[14] In short, the record conclusively shows that prior consent for use of CPNI to market or sell information services is not needed to protect consumers' interests.[15] As a result, the second prong of the forbearance test is met.

§ 10(a)(3): Third, forbearance from requiring prior consent for use of CPNI is not needed to serve the public interest. The Commission has repeatedly found that an opt-out procedure for release of CPNI is in the public interest for wireline services, and it has never applied any prior consent requirements for wireless services. In 1987, it found that "users and customers will be well-served by" an opt-out procedure and that "a CPNI safeguard adopted for the BOCs' provision of enhanced services that is consistent with that we adopted for their unseparated provision of CPE will avoid customer confusion and promote efficiencies." Phase II Order at ¶ 155. The next year, it reaffirmed that an opt-out CPNI procedure "has a number of

[14] The right to provide verbal consent for use of CPNI may alleviate some of this confusion in the case of inbound calls, although the results of this focus group shows that customers will still be unaware of why they must give even that consent. *See* 47 U.S.C. § 222(d)(3).

[15] Bell Atlantic also demonstrated, using actual quotations from customers, that customers expect Bell Atlantic's sales personnel to be able to market and sell them the full range of the company's products without obtaining prior consent to use of CPNI. Supplemental Comments of Bell Atlantic in CC Docket Nos. 90-623 and 92-256 at Att. 2 (filed May 5, 1994).

advantages over a prior authorization rule." Phase II Reconsideration Order at ¶ 97. And most recently, the Commission again concluded that an opt-out approach for residence and small business customers "enables the BOCs to engage in integrated marketing and sales of basic and enhanced services, thereby providing a number of benefits, especially in developing a mass market for enhanced services." Remand Order at ¶ 85. According, the Commission has already made the public interest findings that meet the third prong of the test.

As a result, all three requirements set out in Section 10(a) are satisfied, and, under these circumstances, the Commission is directed by the Act to forbear from requiring prior consent for use of CPNI to market or sell information services.

IV. CPNI May be Used To Win Back Customers after Termination of Service.

The Commission should eliminate the prohibition on the use of CPNI to retain a customer that has chosen to switch service providers. Order at ¶ 85 and 47 C.F.R. § 64.2005(b)(3). The Commission based this prohibition on an overly narrow reading of the statute, and it should reconsider that decision here. Alternatively, the Commission should forbear from enforcing this provision of the Act and its Rules.

a. *Statutory Interpretation*

With little discussion, and with no record support, the Commission determined that, once a customer terminates service from a carrier, information about the service that the customer previously subscribed to may not be used to retain that customer. Order at ¶ 85. It based that determination on its finding that, once a customer terminates service, the CPNI no longer relates to any service the customer takes from that carrier. Therefore, it found, the provisions of Section 222(c)(1) no longer apply. *Id.* This reading of the Act is flawed.

CPNI consists of information "that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship." 47 U.S.C. § 222(f)(1)(A). The statute allows that CPNI to be used to provide of the telecommunications service from which the information was derived or services that are used in, or necessary to, that service. 47 U.S.C. § 222(c)(1). It contains no time limit on that use. Therefore, so long as the information is used only to continue to provide, or seek to provide, the service from which the information was derived, nothing in the Act prohibits the carrier from using it to continue to market and sell that same service to that customer.

b. *Forbearance*

Alternatively, Section 10(a) of the Act directs the Commission to forbear from enforcing the provisions of Section 222(c)(1) of the Act and Section 64.2005(b)(3) of the Rules to allow carriers to use CPNI in order to compete to "win-back" a customer. Again, the three requirements for forbearance are satisfied.

§ 10(a)(1): First, limiting the use of CPNI in win-back efforts is not necessary to ensure just, reasonable, and nondiscriminatory rates. On the contrary, when a carrier is attempting to win back a customer who has decided to switch to a competitor, it will likely offer that customer lower rates, or certainly no higher rates, than before in an effort to retain the business. And because the same rates have to be made available to other customers, by definition there can be no discrimination.[16] The ability of the customer to obtain and consider the

[16] For example, Bell Atlantic will, on request, analyze an existing customer's calling patterns and services and recommend a package of services that will best serve that customer's needs. Bell Atlantic's win-back program actively offers that service in order to retain customers who have switched carriers.

best offer from different carriers is the essence of competition, and the Commission should encourage the competitive market to work in this manner. The first part of the test is met.

§ 10(a)(2): Second, limiting the use of CPNI is not necessary to protect consumers. On the contrary, encouraging such competition can only help protect the consumer. Consumers are often unaware of all of the service and pricing options available to them and, after agreeing to switch carriers, remain confused as to what services they are taking from which carriers. A Bell Atlantic survey of customers who changed local carriers showed that fully two-thirds were unaware that they had changed carriers for all of their local services. More than half of those who had changed intraLATA toll providers had a similar misunderstanding.[17] Of the local service customers who returned to Bell Atlantic, over one-quarter indicated that they had no understanding of the various service and rate options that were available.

Another example of both the confusion and advantages of local competition and the benefits of win-back was documented in a recent Wall Street Journal article that relates the experience when several new wireless service providers began to compete with the incumbent cellular carriers in Jacksonville, Florida.[18] The incumbent instituted an intensive win-back program, matching rates that new competitors were charging. These customers were able to reduce their rates for unlimited service from $395/month to as little as $50/month (at least for a one-year promotional period).

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[17] More than 14 years after divestiture, despite all the publicity and presubscription mailings, some customers are still not aware that they have different carriers for local and interexchange services. It is not surprising that customers would be confused by the increasing array of local, intraLATA, and interexchange services, both wireline and wireless, that are available to them.

[18] Elizabeth Jensen, "Yakking It Up: For Wireless Services, Talk Gets Far Cheaper As Competition Rages," Wall Street Journal, Apr. 27, 1998, at A1.

In addition, a win-back call also allows early detection of slamming (which remains a significant problem), before the customer accrues a significant number of changes with the unauthorized carrier. This use of CPNI is consistent with the statute and the Order, which allow CPNI to be used to prevent "unlawful use of, or subscription to," telecommunications services. 47 U.S.C. § 222(d)(2), Order at ¶ 83. The second prong of the forbearance test is, therefore, met.

§ 10(a)(3): Permitting the use of CPNI in win-back efforts also serves the public interest by giving customers an opportunity to negotiate the best deal from two or more competing providers. Just as a great many customers are unaware of the reduced-price options currently available for interexchange service, despite substantial advertising, they are likely to be unaware that they may likewise save money on local service and intraLATA toll. As the number of competitors for these services increases, so will the various pricing options available to customers, as the Wall Street Journal article discussed above shows was that case for wireless services in Jacksonville . A win-back call may be the best opportunity for a customer to learn of the options that the previous carrier may have available and compare those to the offers of other carriers.

For example, Bell Atlantic's landline companies have initiated a win-back program designed to ensure that consumers are able to weigh all relevant factors. By using CPNI to assess the customer's calling needs (based upon previous calling patterns and the optional services the customer has used), Bell Atlantic is able to give the customer a description of the available services that best meet his or her needs, as well as the bases upon which to compare competing plans – the size of the local calling area, per-minute or unlimited calling options, and

other relevant factors.[19] This allows the customer to weigh all the available options and decide which carrier and service would best serve the need. Accordingly, the public interest is served by allowing a carrier who has lost a customer to use CPNI for win-back, and the third part of the test is met.

In sum, the three prongs of the forbearance test in Section 10(a) are met, and the Commission should modify its rules to allow use of CPNI to win back a customer who has switched to another carrier.

V. The Commission Should Forbear From Applying the CPNI Rules In Their Entirety To Wireless Services and Equipment.

The relief outlined above is appropriate for wireline and wireless services alike, but the Commission should take additional steps with regard to wireless providers. Specifically, it should classify CPE and information services offered in conjunction with wireless services as part of the wireless "basket," or it should forbear from applying the CPNI rules to wireless services and equipment altogether.[20] In this way, all consumers may receive the benefits of a competitive wireless marketplace that is characterized by bundled, discounted offerings of equipment and information services.

Under the Common Carrier Bureau's recent clarification order, CPNI may be used (without prior consent) to offer bundled wireless CPE and information service packages only to customers that now have similar packages. *Order*, DA 98-971, ¶7 (rel. May 21, 1998). This

[19] As discussed above, Bell Atlantic will provide the same type of analysis, upon request, to a customer who has not discontinued service.

[20] The prior consent rules would still apply to other "baskets" that are not part of the customer's total service.

ruling will make it more difficult for customers who do not have complete packages of wireless services and equipment to learn about the discount options that are available. The result will be that the large segments of the population who do not currently have wireless packages will be deprived of the price advantages of a competitive marketplace.

As the Commission found six years ago, bundling of wireless service and CPE has been "a common and generally accepted practice in the cellular industry." Cellular Bundling Order at ¶ 19. It found that "there appear to be significant public interest benefits associated with the bundling of cellular CPE and service." *Id.* The same is true with information services, such as voice mail (which were not before the Commission in the Cellular Bundling Order). As a result, customers perceive CPE and information services as an integral part of their wireless service and would have no reason to expect that CPNI could not used to market all three.

Moreover, although the wireless industry was born competitive, with two providers in every market, events since the Cellular Bundling Order have made it even more so. The Commission has awarded a number of Personal Communications Service licenses in each geographical market, and many new providers, including AT&T and Sprint, have begun to operate nationwide. As a result, the wireless service market is fully competitive, as is the market for related CPE and information services. In an effort to compete, wireless carriers are increasing the variety of bundled packages of telecommunications and information services and equipment they are offering. No public benefit will accrue from constraining this robust competitive market.

Chairman Kennard has recently acknowledged that "the benefits of wireless telephony are now finding their way to Main Street USA." He noted the growing competition for wireless services and urged the Commission to "explore every available opportunity to

promote that competition." He expressed his desire to work with Congress "to eliminate regulatory obstacles" to the development of new wireless services. *Third Annual Commercial Mobile Radio Services Competition Report*, Separate Statement of Chairman William E. Kennard. Before turning the Congress, the Commission should use its existing authority to eliminate unnecessary restrictions on the marketing of wireless services and products.

VI. Specific Systems Requirements Should Be Left to the Carriers.

Besides establishing substantive requirements that carriers must meet, the Commission has prescribed detailed database systems changes that carriers must complete within eight months. Order at ¶ 202, 47 C.F.R. § 64.2009(a) and (c). Bell Atlantic has dozens of separate systems that need to be examined and, potentially, revised to meet the CPNI requirements. At the same time, Bell Atlantic's landline companies are required to revise many of its systems to comply with the requirements of Section 251 and, are working to prevent problems from occurring in the year 2000.

The burdens of these complex new systems rules and the lack of any commensurate benefit are even more significant for Bell Atlantic Mobile and other wireless carriers, which were not previously subject to CPNI rules and, as a result, must conduct a complete review of all their information systems. Each wireless carrier has developed its own systems to suit its particular marketing programs and the services it provides, yet the rules adopt rigid, one-size-fits-all requirements. Nothing in the record justifies this regulatory overkill, because all carriers are already required under Section 222 to safeguard CPNI.

Therefore, rather than micromanaging at this level, the Commission should eliminate Section 64.2009(a) and (c) of the Rules, which specify the systems requirements. It

should give the carriers discretion as to how to change their databases to comply with the new rules, recognizing that they must be able to document that they are complying with Section 222 and the substantive rules.

VII. Conclusion

The Commission should reconsider Section 64.2005(b)(1) and (3) of its rules, and forbear from enforcing Section 222(c)(1) of the Act as it applies to use of CPNI to market and sell CPE and information services, and for win-back, as discussed herein. It should also strike Section 64.2009(a) and (c) of the Rules, which prescribes information systems requirements.

Respectfully Submitted,

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